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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

J. G. MENIHAN CORP., J. G. MENIHAN, SR., AND J. G.
MENIHAN, JR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

The Reconstruction Finance Corporation (hereinafter referred to as "RFC") prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on May 23, 1940, which reversed certain orders of the District Court denying respondents' request for the taxation of court costs and the allowance of attorney's fees against petitioner.

OPINIONS BELOW

The opinion of the District Court (R. 19) is reported in 29 F. Supp. 853. The opinions of the Circuit Court of Appeals (R. 25-30) are not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on May 23, 1940 (R. 30). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

May court costs and an allowance for attorney's fees be taxed against petitioner, a corporate instrumentality of the United States?¹

STATUTE AND RULE INVOLVED

Section 4 of the Reconstruction Finance Corporation Act, c. 8, 47 Stat. 6; U. S. C., Title 15, Sec. 604, provides in part:

The corporation * * * shall have * * * power * * * to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal * * *.

Rule 54 (d) of the Federal Rules of Civil Procedure provides:

Costs: Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs;

¹ In its order, the Circuit Court of Appeals also taxed costs in that court against petitioner (R. 30), and, in the argument on the merits, petitioner will urge as part of the question presented that such costs were likewise improperly taxed.

but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

STATEMENT

Pursuant to the provisions of Section 5d of the Reconstruction Finance Corporation Act, as amended, petitioner made a loan to the J. G. Menihan Corp. upon the security of certain collateral, which included trade-marks owned by the company (R. 11). Upon the bankruptcy of the company, petitioner acquired title to the collateral at a trustee's sale (R. 11-12), and thereafter brought proceedings to enjoin respondents from trade-mark infringement and unfair competition (R. 6-7).

After trial, the District Court dismissed petitioner's bill on the merits (R. 4-5). However, it refused to tax court costs against petitioner (R. 4-5) and denied respondents' application for an additional allowance for attorney's fees (R. 5-6, 30), on the ground that "the imposition of costs against the plaintiff, a governmental agency, is not permitted by law" (R. 5-6, 19).

Respondents thereupon appealed to the Court below from so much of the orders of the District Court as denied their applications for costs and for an additional allowance for attorney's fees (R. 2-3). The court below (Clark J., dissenting) held

that the District Court had power to tax costs and additional allowances against petitioner, and reversed the orders of the District Court appealed from (R. 25-30).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that court costs and additional allowances may be taxed against petitioner.
2. In taxing costs in that court against petitioner.
3. In reversing the orders of the District Court appealed from.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in direct conflict with the decision of the United States Circuit Court of Appeals for the Tenth Circuit in *Federal Deposit Insurance Corporation v. Casady*, 106 F. (2d) 784. In that case, the court reversed an order of the District Court allowing costs to be taxed against the Federal Deposit Insurance Corporation, which, like RFC, is a corporate instrumentality of the United States devoted exclusively to the purposes of the United States. The ground of decision was that "being a governmental agency, costs should neither be awarded in its favor nor against it" (p. 792). The same ruling was made by that court without discussion in *Federal Deposit Insurance Corporation v. Barton*, 106 F. (2d) 737.

The statutory provision authorizing suits by and against the Federal Deposit Insurance Corporation² is substantially identical to the RFC provision.

Both the majority and dissenting opinions below recognize the existence of the conflict with the Tenth Circuit (R. 28, 29).

The decision of the court below is also in substantial conflict with the United States Circuit Court of Appeals for the Seventh Circuit in *National Home v. Wood*, 81 F. (2d) 963, affirmed on other issues in 299 U. S. 211, 212n. In an action against the National Home for Disabled Volunteer Soldiers, after the transfer of its property to the United States, the court held that costs may not be taxed against it. The statute provided that suits on obligations of the Home may be brought in the District Courts and the Court of Claims "according to the ordinary provisions of law governing actions against the United States, and such courts shall have the power to enter judgment against the United States, with interest, in the same manner and to the same extent as if said cor-

² Section 101 of the Banking Act of 1935, c. 614, 49 Stat. 684, 692, amends Section 12B of the Federal Reserve Act by adding, *inter alia*, subdivision (j) which empowers the Federal Deposit Insurance Corporation—

"To sue and be sued, complain and defend, in any court of law or equity, State or Federal." (U. S. C., Title 12, Sec. 264 (j).)

poration were party defendant": Sec. 5 (b) of Act of July 3, 1930, c. 863, 46 Stat. 1017.

2. The question here presented recurs frequently in the widespread litigation carried on by the large number of governmental instrumentalities empowered to sue and be sued.⁴ It is generally disposed of in the orders of the District Courts without opinion, and, in view of the decision of the court below and of the *Casady* and *Wood* cases, there is little likelihood that, without an authoritative determination, the practice of the District Courts will be uniform.

CONCLUSION

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

✓ FRANCIS BIDDLE,

Solicitor General.

CLAUDE E. HAMILTON, Jr.,

General Counsel,

Reconstruction Finance Corporation.

JULY 1940.

³ The sue-and-be-sued clause relating to the National Home, prior to the transfer of its property to the United States, did not differ substantially from the RFC clause and provided (R. S. Sec. 4825) that it shall have power "to sue and be sued in courts of law and equity."

⁴ A list of forty of such corporate instrumentalities is contained in the opinion of this Court in *Keifer & Keifer v. RFC & R. A. C. C.*, 306 U. S. 381, 390-391n.

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